Minutes of the 81st meeting of the Board of the EHRC

16 January 2019
Fleetbank House, 2-6 Salisbury Square, London, EC4Y 8JX

Attending:

Commissioners
David Isaac, Chair
Suzanne Baxter
Pavita Cooper
Alasdair Henderson
Susan Johnson
Helen Mahy
Mark McLane (by videoconference)
June Milligan
Caroline Waters
Rebecca Hilsenrath, Chief Executive Officer

Officers
Hardeep Aiden, Senior Associate - Research (item 5)
Kate Bell, Senior Associate – Communications (item 7)
Joe Corcos, Director - People and Infrastructure (by videoconference)
Martin Deller, Principal – Communications (item 7)
Melanie Field, Executive Director – Strategy and Policy and Wales
Annika Joy, Principal – Strategic and Business Planning (items 5 and 10)
Alasdair MacDonald, Director – Programmes (item 9)
Olufemi Oguntunde, Director - Finance and Procurement
Alastair Pringle, Executive Director - Scotland and Corporate Delivery
Elizabeth Prochaska, Director – Legal (items 7-12)
Paola Uccellari, Director – Strategic Planning and Policy (items 5 and 10)
Graham Wheaton, Senior Associate - Corporate Governance

Guest
Anna Wechsberg, Interim Director – GEO

Observing
Hannah Wharf, Principal – Wales Team
Richard Mabbitt, Senior Associate - Corporate Governance

1. Chair's welcome, attendance and apologies for absence

1.1 David Isaac welcomed attendees. Apologies had been received from Commissioners Lesley Sawers and Swaran Singh. Joe Corcos was standing in for Ben Wilson (ED - England, and Corporate Delivery and Impact) during his paternity leave.

2. Declarations of interest

2.1 The Board considered their individual obligations to avoid a conflict (or the perception of a conflict) with regard to the Commission's regulatory powers. They noted that, given the nature of the regulatory work, there was a very high obligation on members of the Board to avoid any actual or perceived conflict of interest arising.

2.2 In light of the above, the following conflicts of interest were declared at the outset of the meeting:

a) **Equal Pay Investigation**: In relation to the Equal Pay Investigation to be raised at item 9, David Isaac noted that the law firm in which he was a partner (Pinsent Masons) acted from time to time for the BBC on matters unrelated to Equal Pay. Although the Board was content that this did not represent a substantive conflict of interest, there was concern that there could be a perception of bias and, therefore, David Isaac agreed to recuse himself from determination in relation to this matter.

b) **Antisemitism Investigation:** In relation to the Antisemitism Investigation to be raised at item 9, Rebecca Hilsenrath reminded the Board that she is an active member of the Anglo-Jewish community. Although the Board was content that this did not represent a substantive conflict of interest, there was concern that there could be a perception of bias and therefore Rebecca Hilsenrath agreed to recuse herself from determination in relation to this matter.

c) **Higher Education Race Inquiry**: In respect of the Commission's current Inquiry into Racial Harassment at Higher Education Institutions: David Isaac, Susan Johnson and June Milligan reiterated their interests (already duly registered) in higher education institutions. Officers leading this work were aware of these interests and similar interests registered by Commissioners Swaran Singh and Lesley Sawers. Members undertook to withdraw from any activity at these institutions relating to the Inquiry.

2.3 The Board additionally noted that:

a) Caroline Waters was joining the remuneration committee of Midland Heart housing association as an adviser;

b) Mark McLane had left Barclays Bank plc and would be taking up a new role with M & G Prudential at the beginning of February 2019;

c) Rebecca Hilsenrath had been elected Chair of the Association of Chief Executives.

3. Minutes of the last meeting

3.1 The minutes of the 80th Board meeting of 15 November 2018 (paper EHRC 81.01) were agreed as a true record.

4. Actions arising

4.1 The Board reviewed the log of actions arising from Board meetings (EHRC 81.02). It felt that good progress had been made on historic actions. In addition:

a) on action 80/7.3 (England Strategy), Caroline Waters reported that Terms of Reference were being finalised, and initial conversations for the CWG would take place by correspondence with future meeting dates being planned.
b) In relation to the closed action 74/6.5 (Income Generation) Rebecca Hilsenrath reported that there were several regulators discussing this with HM Treasury in terms of whether the government would seek to recover any alternative income received. She would suggest it as an agenda item for the Regulators Hub meeting. The issue had been delegated to ARAC who would consider it at such time as HM Treasury's position became clear.
c) on Action 73/7.3 (Access to Justice Evaluation) the Board noted that the paper would now be shared with the Board in March 2019.

4.2 The Board noted that a specification for the Board management software requested by members during the Board Effectiveness review was being developed by the Commission's ICT team. Helen Mahy agreed to assist with the development of the specification, procurement and roll out. **Action: Lee Blinkhorn/Callum MacInnes** to progress procurement action.

5. CEO's update

5.1 Rebecca Hilsenrath updated the Board on current priority work areas.

Strategic Plan

5.2 Board members noted key statistics from the strategic plan consultation which had closed on 7 January. It was noted that:

a) there were almost 1,000 responses;
a) two thirds of responses were from individuals and a third from the voluntary sector, public bodies and other organisations;
b) around half of respondents identified disability as one of the protected characteristics most important to them;
c) indicatively, responses were broken down by country as 10% based in Wales, 16% based in Scotland, 64% based in England and 20% not known;
d) due to the large volume of responses, analysis was still ongoing but an emerging theme was that detention and new technology should be lower down the order of priorities.

The Board was pleased with the high level of stakeholder engagement achieved, while acknowledging the challenges this posed for officers. It was noted that initial analysis showed broad support for the themes and objectives

the Commission had set out and that useful evidence had been secured for further refining the strategic plan objectives. The Board asked for an interim summary of consultation results. **Action Paola Uccellari and Annika Joy**

5.3 Paola Uccellari briefed the Board on the joint Board and Committee Strategic Plan workshop on 11-12 February. External specialist facilitators with experience of the Commission's work had been commissioned and the agenda for the event was being finalised. The results of the Strategic Plan Consultation and the revised draft of the plan would be presented and discussed both in plenary and breakout groups. The Board felt that given the tight signoff timescales, additional time needed to be built into the programme for the Board to review the themes of the plan, ahead of the Board meeting on 5 March 2019. The Board noted that Wales Committee member, Alison Parken, would deputise for June Milligan.

Action: Paola Uccellari and Annika Joy to continue developing the agenda for the event, keeping David Isaac and Caroline Waters in the loop. This should include additional time for Board reflection on the day, and in an additional telephone meeting before the next Board meeting.

5.4 Board members noted the business planning update (paper EHRC 81.03) with no further comments.

Finance and Performance Report, and Strategic Risk Register

5.5 In line with the Board Effectiveness Review ask for a greater focus on strategic discussion items at Board meetings, these papers had been circulated separately to Board Papers for information on this occasion. Fuller discussion was programmed for the 5 March Board meeting. Rebecca Hilsenrath reported that officers would review the phasing of these routine reports to the Board, to better balance up-to-the minute reporting with due reading/reflection time for Commissioners in advance of scheduled meetings.

5.6 In relation to the forecast underspend, the Board noted that at c£420k, it was larger than anticipated although still within the 3% tolerance limit. The increase in forecasted underspend was due in part to receipts relating to legal cases and from BT (due to historic overcharging), plus some project slippage. The outcomes of Employment Tribunal cases, budgeted for in the current financial year, were also not yet known – either in terms of liability, value or timing - and this could potentially increase the underspend. Members were advised that discussions were ongoing with DfID about using the 'Budget Exchange Mechanism' which allows up to 2% of budget to be carried forward into to the following year. This would reduce the current year's budget by £250k, increasing the 2019/20 budget by the same amount, effectively reducing the underspend to c£170k. Members were pleased with the developments around the exchange mechanism, but emphasised the importance of a clear narrative around any underspend and what it meant in practice for the Commission and its stakeholders.

People Survey

5.7 The People survey had now closed and although results were still being analysed, the overall indication was that the results were positive. An information paper would be circulated. **Action: Joe Corcos**

Ethnicity Pay Gaps

5.8 The Commission had now responded to the Department for Business Energy and Industrial Strategy consultation seeking views on ethnicity pay reporting by employers. Members noted that employers were alert to the possibility of further pay gap reporting requirements, and the need for a joined up approach to reporting across different strands. The Commission should not shy away from a possible enforcement role, but while valuable experience and credibility had been gained through its enforcement of gender pay gap reporting, such a role needed to be adequately resourced given the societal and technical complexities of reporting against ethnicity. An early view on timescales for the roll out would be important.

5.9 Having in mind the Accessible Websites Regulations issues (to be discussed at item 11) Board Members were concerned generally about a potential unmanaged increase in the Commission's regulatory activity, and felt the Commission needed to understand fully what was being taken on; how any additional work would be funded; and the implications of any reprioritisation that this necessitated. This was something that should be mentioned in the response to the upcoming spending review. Members felt that this was an important strategic issue on which the Board needed to remain fully sighted.

Correspondence

5.10 The Board noted recent correspondence with Justice for Men and Boys. The Commission had offered a meeting, on which Alastair Pringle would lead. The Board noted that the Commission already had constructive relationships with other men's rights organisations.

6. Committee Chair's reports

6.1 Alastair Pringle (on behalf of Lesley Sawers) updated on recent Scotland Committee activity. Draft minutes of the meeting of the Scotland Committee meeting of 12 December had been shared separately with the Board. Commissioners had agreed to the reappointment of Committee members Clare MacGillivray and Naomi McAuliffe (paper for decision by Correspondence of 7 January refers). Board members noted that Campbell Tickell's Committee-focussed follow up to the Board effectiveness review was ongoing in Scotland and (Wales).

6.2 June Milligan reported on recent Wales Committee Activity.

a) She tabled a paper seeking board approval for the appointment of Mark Sykes as a Wales Committee member, following Andrew

Edwards' early retirement through ill-health. Members thanked Andrew for his service to the Wales Committee and agreed Mark Sykes's appointment, noting his wide range of valuable skills and experience.

b) She noted that a new First Minister, Mark Drakeford, had been appointed to the Welsh Government and had brought in Jane Hutt as Equalities Minister. Jane Hutt was well known to the Commission in Wales.

c) She highlighted the Commission's draft 'If Not EU Then Who' research report which noted potential significant funding losses in Wales and Scotland following Brexit. The Board asked for sight of the final report and clarification of handling before publication proceeded. **Action: Paola Uccellari**

6.3 Melanie Field reported on the Disability Advisory Committee meeting of 6 November 2018. Draft Minutes had been shared separately with the Board. She noted that DAC members had come together to provide a joint response to the Strategic Plan Consolation. Their response would be shared with Commissioners after the meeting. **Action: Graham Wheaton**

6.4 Susan Johnson reported on ARAC matters. Draft Minutes of the meeting of 18 November 2018 had been shared separately with the Board. Discussion had included the Commission's Whistleblowing Policy, and the disaster recovery test of ICT systems planned for the end of January 2019. Susan thanked Head of ICT Lee Blinkhorn for all his hard work in the latter area.

6.5 Caroline Waters advised the Board that the re-formed HRRC would be meeting after this Board meeting.

7. Communications/Legal Strategy

7.1 Elizabeth Prochaska introduced paper EHRC 81.04 which set out a proposed approach to publicising successful outcomes in the Commission's legal work. The Board reflected on the considerations set out in the paper and discussed how activities proposed would be taken forward, particularly through more effective use of the website The Board felt this was an excellent paper and suggested that the Commission should:

a) look at organisations that do this kind of work well, such as health regulatory bodies and the HSE;
b) ensure that information placed on the website is publically accessible;
c) engage with stakeholders in a more coherent way on our legal work;
d) monitor ongoing compliance;
e) change the language used to describe the Commission's enforcement powers to put it into a more user friendly context.

7.2 The Board commented that there was good direction of travel with this work and were keen that it continued. It asked for an update in due course. **Action: Elizabeth Prochaska/Martin Deller**

8. Investigations

Equal Pay Investigation

8.1 Elizabeth Prochaska spoke to paper EHRC 81.05 which sought Board direction in relation to a Section 20 investigation (already approved by the Prioritisation Group) against the BBC, which is suspected of unlawful acts under the equal pay provisions of the Equality Act 2010.

8.2 The Board discussed the proposal at length and heard from officers that a meeting had been held with the BBC just prior to this Board meeting and they had been given one week to come back with alternative proposals. The investigation would cover a broad range of levels and role descriptions of staff at the BBC, although it was not a 'cross market' review. Board members commented that there was a strong direction from the Women and Equalities Select Committee to pursue this type of legal enforcement. Board members also noted the likely high profile of the investigation and related media coverage (primarily on high-profile presenting talent), and the challenges and opportunities that this posed.

8.3 Board members asked that the Commission:

a) consider carefully potential unintended consequences.
b) be very clear in external communication about the justification for investigating the BBC rather than other bodies;
c) take due account of the wider debate about the public funding of the BBC in a context of intense pressure on the public purse
d) factor in the complexities around different types of contract in use at the BBC and by other broadcasters and the quantification of 'talent';
c) the strategic value of (and risks to) the Commission making the case that public money should not be spent without due regard to equality.

8.4 The Board agreed that a Section 20 investigation be taken forward with the proviso that scenario planning, together with any reputational or handling issues, be brought back to the Board regularly. **Action: Elizabeth Prochaska**

Anti-Semitism Investigation

8.5 Elizabeth Prochaska updated the Board about progress considering the two requests for an investigation into anti-Semitism in the Labour Party. The Board agreed that the Chair should provide direction to the Prioritisation Group on next steps. **Action: David Isaac**

9. Working Forward

9.1 Alasdair MacDonald introduced paper EHRC 81.04 which asked the Board to consider outsourcing the operational management of Working Forward and to advise on the most effective way forward. Some Board members had discussed this issue in teleconference with the Chair on 19 December and some concerns had been raised about the likely outsourcing model. The

outsourcing process had therefore been paused to allow further consideration by the Board.

9.2 Members noted the successes that Working Forward had delivered. However, it felt that a broader evaluation was required to determine the key impacts Working Forward had made, so that it could be refreshed in light of the Strategic Plan. It was important that if a re-procurement was decided upon, the procurement envelope was broader to reflect links between working forward and the Commissions wider work. The Commission also needed to determine clear success criteria and be assured of the capacity and capability of the supplier to deliver effectively and in a joined up way, having in mind the related activity of other employers' and employees' organisations.

9.3 The Board therefore asked that that the current procurement process be terminated while an evaluation took place. The Board asked for a report on progress to be provided before any new procurement was initiated. **Action: Alasdair MacDonald**

10. Public Sector Equality Duty

10.1 Paola Uccellari spoke to paper EHRC 81.07 which highlighted the opportunity presented by the Commission's new Strategic Plan to set out how the Commission might maximise the potential of the duty to drive progress. In addition, a number of opportunities to shape changes to the specific duties had arisen. The paper presented for the Board's agreement a Commission policy on the specific duties, to be advanced according to the differing needs, opportunities and contexts in England, Scotland and Wales.

10.2. Board members reflected on the how the PSED was applied in practice. They noted:

a) the different needs, opportunities and contexts in England Scotland and Wales, and the stakeholder engagements that were in place to reflect this;
b) a tendency for foundational and process-focussed objectives, rather than those which addressed directly the kind of persistent inequalities shown in Is Britain Fairer?;
c) that understanding how PSED obligations were perceived by public authorities in relation to their own priorities was essential. Identifying shared goals and connections would help avoid de-prioritisation of PSED on the bases of resource or competing priorities. The role of elected members was noted;
d) the totemic role of PSED for specific interest groups and the need for a convincing narrative that refocussing the PSED as a targeted strategic duty did not dilute its effects at a local level.

10.3 The Board agreed that the Commission should adopt the approach set out in the paper. It should commence influencing work with governments to amend the specific duties in line with the proposals set out in detail in the paper.

Accessible Website Regulations

11.1 Elizabeth Prochaska introduced paper EHRC 81.08 which detailed how these Regulations would, from September 2020, require UK public sector bodies to make their websites accessible for users. Government Digital Services (GDS) was to be the monitoring and reporting body providing technical assessment of websites and working to ensure that accessibility obligations were met, with recourse – where necessary - to enforcement bodies, named in the Regulations as the Commission and (for Northern Ireland) the Equality Commission for Northern Ireland.

11.2 The Board welcomed the new Regulations and acknowledged that this enforcement role fell within the Commission's mandate. It noted that Government felt that the fact that the scope of the Regulations was restricted to the public sector, and the proactive provision by GDS of advice and support to bodies in scope, would likely mean a relatively small amount of enforcement action. Nonetheless, the Board felt that - with no new resource available to undertake this new work - there were risks of a potential additional burden on the Commission which might affect delivery of its other priorities. Equally, there were risks of criticism from external organisations and others for not doing enough should it be the case that only a small number of referrals be made. And there was scope for reputational risk-by-association should GDS pre-enforcement activity not be carried out effectively. The Board felt that these risks were likely to be generic should the Commission be cast in future as the enforcement body for other regulatory regimes (for example on disability pay gaps). The highly technical nature of the regulations posed a specific additional capacity and capability risk.

11.3 The Board recognised that the draft memorandum of understanding (MoU) with GDS and ECNI had usefully established an arm's length role for the Commission, with EASS as the first point of contact. It also reflected the active role of GDS in supporting public bodies on compliance. Nonetheless, the Board felt that the MoU as currently drafted did not fully address these risks. It felt in particular that robust criteria for reviewing resources based on volume and substance of cases were required.

11.4 The Board concluded that it was content with the broad direction of travel on enforcing the Regulations. It asked, however, that:

a) ongoing discussions with GEO (including the spending review narrative) emphasised the finite capacity of the Commission to deliver against effectively new enforcement asks without compromising existing strategic enforcement objectives;
b) the MoU be renegotiated to address its concerns.

Action: Elizabeth Prochaska

11.5 The Board noted the importance of ensuring that the Commission's own website was fully compliant with the Regulations well in advance of the compliance deadline, and asked for a progress update. **Action: Erica Boardman**

12. Any Other Business

12.1 David Isaac thanked attendees and closed the meeting. The next meeting was scheduled for 5 March 2019, and members of the Board would also be meeting with members of the Scotland, Wales and Disability Advisory Committees on 11-12 February for a Strategic Plan workshop.

Agreed by the Board at its 82nd meeting of 5 March 2019